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SUPREME COURT, U.S.

No. 97-1786

In The

Supreme Court of the United States

October Term, 1997

DELROY R. BLASKE,

Petitioner,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S RELY BRIEF

John H. Scherer - 13076X
Counsel of Record
Rajkowski Hansmeier Ltd.
Attorneys for Petitioner
11 Seventh Avenue North
P.O. Box 1433
St. Cloud, MN 56302
Telephone (320) 251-1055

I. INTRODUCTION

Petitioner, Delroy Blaske submits this Brief in reply to the Respondent's Brief in Opposition. This Brief will address the three arguments for denial of the Writ of Certiorari discussed in the Respondent's Brief in Opposition.

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> Required provisions. Except as provided in subdivision 4, each such policy delivered or issued for delivery to any person in this state shall contain the provisions specified in this subdivision in the words in which the same appear in this section. The insurer may, at its option, substitute for one or more of such provisions corresponding provisions of different wording approved by the commissioner which are in each instance not less favorable in any respect to the insured or the beneficiary. Such provisions shall be preceded individually by the caption appearing in this subdivision or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve.

Minnesota Statute § 62A.04, Subd. 2(7) (1995) . . . . .

PROOFS OF LOSS: Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 90 days after the termination of the period for which the insurer is liable and in case of claim for any other loss within 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

Minnesota Statute § 62A.04, Subd. 2(11) (1995)

LEGAL ACTIONS: No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

II. ARGUMENT

A. Petitioner's question for review was presented to the Eight Circuit Court of Appeals.

The Respondent alleges that the question presented for review was not argued to the Eighth Circuit Court of Appeals or the District Court. This statement is not accurate.

In presenting this Petition for a Writ of Certiorari, Petitioner asks this Court to reconcile the contradictory holdings of the United States Court of Appeals for the Eighth Circuit and the holding of the Ninth Circuit expressed in the case of Nikaido v. Centennial Life Ins. Co., 42 F.3d 557 (9th Cir. 1994). The Nikaido was cited to the Eighth Circuit panel, first during oral argument and later in the Appellant's Petition for Rehearing by the Panel. Following oral argument, acting at the direction of the Court, counsel for the Petitioner sent a letter with the case cite to the Eighth Circuit Clerk of Court.

In addition, on page 22 of Petitioner's Appellate Brief, it is argued that in a case of this nature, where an individual is suffering from a continuing disability, a separate claim arises for each period during which benefits may be payable. The tolling of the statute of

limitations is determined in reference to the period for the filing of a proof of claim.

B. There is a conflict between the Eighth and Ninth Circuits.

The Respondent argues that Nikaido v. Centennial Life Ins. Co., 42 F.3d 557 (9th Cir. 1994) is distinguishable from the present facts because of the language contained in the specific disability insurance policies interpreted in the cases. In support of this contention, Respondent looks to Cisneros v. UNUM Life Ins. Co., 134 F.3d 939 (9th Cir. 1998).

The Respondent's argument fails due to the fact that the issue in Cisneros was the application of the proof of claims provision of the policy. The Cisneros Court, interpreting UNUM policy language, did so in the context of proof of claim, not in consideration of the issue of the statute of limitation.

In fact, the UNUM policy at issue here contains the following language:

> "When are claims paid?
> When we receive proof of claim, benefits payable under the policy will be paid monthly during any period we are liable."

This UNUM policy language is consistent with the Nikaido policy language, for purposes of determining

the application of the statute of limitations. The UNUM policy contemplates monthly periods for determining the payment of disability benefits. The issue of UNUM's liability under the policy is subject to monthly review at the discretion of UNUM. The Nikaido analysis is applicable to the present case. For each month that Mr. Blaske is disabled, and UNUM fails to make payment, a separate cause of action accrues.

C. The UNUM policy is not consistent with Minn. Stat. § 62A.04, Subd. 2.

The Respondent argues that the statute of limitations provision of the UNUM policy is consistent with the Minnesota Statute (Minn. Stat. § 62A.04). Therefore, the Eighth Circuit was correct in affirming the District Court, but Respondent fails to give consideration to the manner in which Minnesota Courts have interpreted Minn. Stat. § 62A.04, Subd 2. In the case of Ryan v. ITT Life Ins. Corp., 450 N.W.2d 126 (Minn. 1990), Minnesota Supreme Court stated:

> "When an insured claims total disability benefits under a policy governed by Section 62A.04, Subds. 2(7) and (11), the limitation's period will not begin to run until 90 days after termination of the continuous period of disability."

In this case, the Petitioner has alleged a continuous period of disability. Therefore, under Minnesota law, the statute of limitations does not run

until three years after Mr. Blaske's period of disability has ended. The holding of the Trial Court, as affirmed by the Eighth Circuit Court of Appeals, ignored this interpretation of Minnesota law.

III. CONCLUSION

Therefore, Petitioner requests the United States Supreme Court to accept Delroy Blaske's Petition for Writ of Certiorari for the purpose of reviewing and clarifying this important issue of law.

Respectfully submitted,

John H. Scherer - 13076X
Rajkowski Hansmeier Ltd.
11 Seventh Avenue North
P.O. Box 1433
St. Cloud, MN 56302
Telephone (320) 251-1055

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